



CITY OF DURHAM | DURHAM COUNTY
NORTH CAROLINA

MEMORANDUM



Date: January 3, 2011

To: Members of the Durham City Council
Through: Steven L. Medlin, AICP, Planning Director
From: Keith M. Luck, AICP, Assistant Director for Strategic Planning
Subject: Southwest Durham Urban Growth Area Boundary Amendment

Summary

This is a request for the City Council to adjust the Urban Growth Boundary so that the properties identified below are included within that boundary. In 2005, the owners of several parcels of land in southwest Durham County requested that the Planning Director make an interpretation about the location of the Jordan Reservoir Normal Pool and the associated one mile Critical Area boundary. In January 2006, based on surveys of the location of Jordan Lake, the Planning Director determined that the property owners provided better information about the normal pool location than Durham previously possessed. He administratively determined a new location for the one mile Critical Area, in accordance with UDO Section 4.11.3, Rules for Interpretation of Overlay Boundaries, and the Urban Growth Area related to these parcels. This determination was upheld by Superior Court Judge Howard Manning in December 2009 in *Southern Durham Development Inc. v. Durham County*. The County of Durham was a party to that action, but not the City of Durham and the decision does not bind the City. However, the City Council may choose to act in accordance with that ruling, at least with regard to the UGA boundary, over which it has control. Southern Durham Development, Inc. has requested that the City enter into an extension agreement to allow utilities to be extended to its property after annexation and zoning of the property. A Council determination that the property is within the UGA is needed in order to allow the extension agreement to be approved.

Recommendation

The staff recommends that the City Council amend the Durham Urban Growth boundary to include the parcels that were the subject of the Planning Director's January 2006 interpretation.

Background

Interpretation Request. In 2005, the owners of fourteen parcels of land in southwest Durham County requested that the Planning Director make an interpretation about the location of the Jordan Reservoir Normal Pool and the associated half-mile Critical Area boundary. The property owners presented survey information, stamped and sealed by a

professional surveyor, related to the location of the normal pool of the Jordan Reservoir. The survey information included State plane coordinates associated with several points defining the edge of the normal pool at elevation of 216 feet, including one point along the channel of New Hope Creek.

The survey information provided by the property owner showed the normal pool in a significantly different location than the USGA topographic map, which has been the basis of the City's determination of the location of the watershed protection Critical and Protected Area.

Planning Director's Interpretation. In January 2006, Planning Director Frank Duke determined that the survey represented better information about the normal pool location and used it to administratively determine what he considered to be the proper location of the one mile Critical Area and the five mile Protected Area. The Planning Director believed he had authority under the Durham Unified Development Ordinance, Section 4.11.3, Rules for Interpretation of Overlay Boundaries, to make this determination.

This interpretation had the effect of delineating the location of the Jordan Reservoir normal pool such that it extended much less north and east than the boundaries identified on the USGS map. Consequently, overlay zones representing the 1-mile Critical Area and 5-mile Protected Area associated with the normal pool location would have been much smaller than previously delineated. With this interpretation, the Critical Area around Jordan Reservoir was reduced by approximately 230 acres. This action affected the following parcels, indicated by their Parcel Identification Numbers (PINs) in 2006. (Note that the PINs have changed since 2006; the seventeen equivalent PINs as of 2010 are also shown.)

PINs in 2006	PINs in 2010
0717-03-21-5153	0717-03-21-9302 (partial)
	0717-03-20-7945 (partial)
0717-03-30-1620	0717-03-30-5690 (partial)
0717-03-31-1481	0717-03-30-5690 (partial)
	0717-03-21-9302 (partial)
0717-03-31-9909	0717-03-31-9934
0717-03-41-2354	0717-03-41-2341
0717-03-41-9127	0717-04-40-6984
	0717-04-51-0985
0717-03-44-1076	0717-03-44-2004
0717-03-24-9770	0717-03-34-0901
0717-03-30-2148	0717-03-30-5690 (partial)
0717-03-31-5796	0717-03-31-6712
0717-03-33-9131	0717-04-32-9923
0717-03-41-5783	0717-03-41-3705
0717-03-44-0386	0717-03-44-0374
0717-04-40-5292	0717-03-40-2109
	0717-03-40-3295 (partial)
0717-04-51-0959	0717-04-51-0985

See Map 1, Parcels Proposed for Inclusion in the UGA.

Urban Growth Area Interpretation/Prior Extension Agreement. At that time, Mr. Duke also administratively adjusted the Urban Growth Area (UGA) boundary, which separates the Suburban Tier from the Rural Tier. The Durham *Unified Development Ordinance*, Section 4.1.2.E, indicates that the Planning Director shall revise the Development Tier Map, if necessary, following an interpretation of a Boundary Watershed Critical Area pursuant to Sec. 4.11.3, Rules for Interpretation of Overlay Boundaries. Apparently, Mr. Duke reasoned that an interpretation of the Critical Area boundary also called for an administrative adjustment to the UGA boundary. The process for amending the UGA boundary, which is essentially a City boundary useful for determining where it may be appropriate to extend utilities, was not clearly set forth in any ordinance. Based on Mr. Duke's interpretation, and the assumption that this area was inside the UGA, the City Council approved a utility extension agreement in 2007 to support very low density residential development of 156 lots on 251 acres. Development was not undertaken pursuant to that agreement and the agreement is now void.

Division of Water Quality Approval. The State's Division of Water Quality ("DWQ") determined that the County "acted outside its authority when it adjusted the normal pool location and the watershed boundaries..." The NC Administrative Code, in Rule 15A NCAC 02B .0104(o), states that all revisions (expansions and deletions) to the Environmental Management Commission (EMC) adopted critical and protected area boundaries or to the local government's interpreted critical and protected area boundaries must be approved by the EMC prior to adoption by the local government. Further, DWQ has indicated that the authority to determine the location of the normal pool of a water supply reservoir rests primarily with the Army Corps of Engineers. The County requested approval from DWQ in November 2008 for the Duke watershed overlay boundary interpretation. In February 2009, the DWQ approved the boundary interpretation, noting that the DWQ staff believes "...that the revised map you submitted for review does represent the location of the normal pool elevation and associated watershed boundaries more accurately than the current map."

Overlay Boundary Issues. The property owner who had originally requested and received the interpretation transferred a portion of the property to Southern Durham Development, which submitted a request to the County to develop an intense mixed use development. The County Attorney determined that prior to moving forward with the proposed zoning, the County should take official action and vote on the administrative change to the Jordan normal pool and the boundaries of the overlay zones, since the Planning Director was not acting within his authority in making the original interpretation. Southern Durham Development sued, however, seeking to enforce the Planning Director's determination. (*See further description below*). The County Commissioners approved the new location of the normal pool and the overlay zone changes and that action was appealed by owners of other properties not listed above who were impacted by the change. However, while that action was pending, the lawsuit brought by Southern Durham Development was decided in its favor, as described below. ***Southern Durham Development Inc vs. Durham County.*** As noted above, Southern Durham Development sued Durham County to establish the

legitimacy of the Planning Director's 2006 interpretation and to obtain monetary damages for the delay the County's consideration had caused it. In December 2009, Superior Court Judge Howard Manning upheld portions of the Southern Durham Development's claim, though he rejected the Plaintiff's claim for damages. Manning ruled that:

...The Official Interpretation issued by the Durham County Planning Director on January 6, 2006 is valid and binding in all respects, is a final determination on all matters to which it pertains, as of the date it was issued and is not subject to further appeal; and

No actions taken by the Defendant after the date of the Official Interpretation which are inconsistent with its terms are valid, and no further actions by the Defendant shall affect, or otherwise disturb the determination of the location of the Jordan Lake Watershed Critical Area as set forth in the Official Interpretation as it relates to the property described in the Official Interpretation. Nothing in this Order shall be construed to limit the legislative authority of the county as provide by applicable law.

Durham County did not appeal the above decision.

Current Zoning. Southern Durham Development moved ahead with its proposal for a mixed use development on the property. The County approved the zoning for a mixture of townhome, commercial, and office development in August of 2010. Various issues related to the validity of protest petitions that had been filed against the rezoning were decided in favor of Southern Durham Development by the County Attorney. Those issues have been appealed to Superior Court by persons and groups opposing the zoning. The resolution of those issues could potentially impact whether the County determination allowing the new mixed use zoning development stands, but it would not impact the issue of whether the property is inside or outside the critical watershed boundary, at least with regard to Durham County, since that issue has already been determined. Last spring, the Developer, prior to the zoning consideration by Durham County, applied to the City of Durham for both an extension agreement as well as annexation. The request for an extension agreement cannot be approved absent a City Council vote to adjust the UGA line. The Council has discretion to adjust the UGA line. To conform the UGA line with the critical watershed boundary, the Council could proceed with a vote on the overlay boundaries at the time it acts on the zoning of the property which would occur after annexation.

Alternatives. The City Council could choose to defer this action until there is a resolution of the lawsuit in Superior Court. Or, the City Council could choose to officially take up the watershed boundary zoning first, prior to the UGA determination, which would be the more "normal" manner in a usual case. Given the history of this development and the prior allowance by the Council of an extension agreement under the assumption that the property was within the UGA, as well as the court decision in

the lawsuit against the County, approval of extension of the UGA for this development appears appropriate as a first step.

Contact

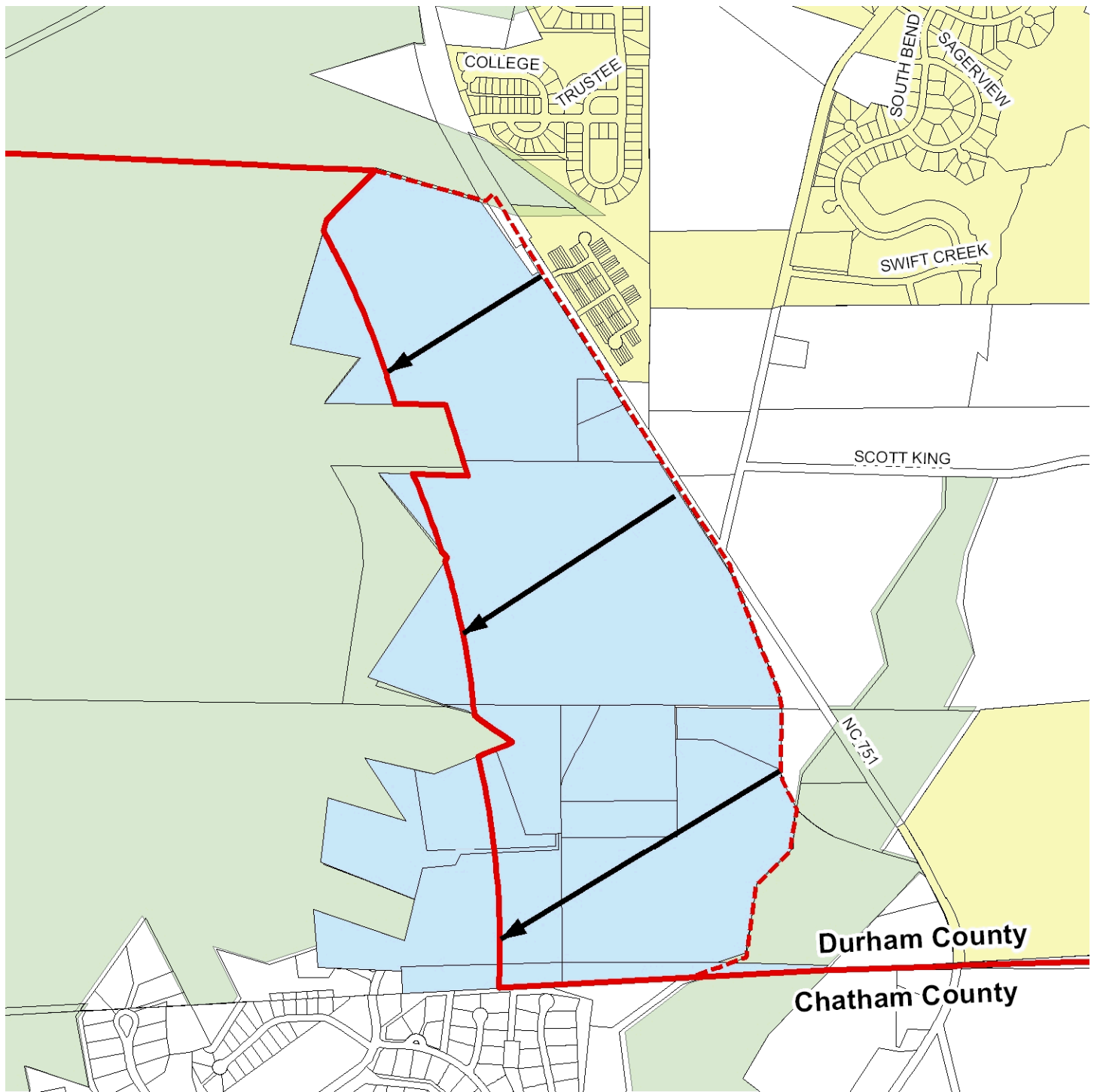
Keith M. Luck, Assistant Director, 560-4137 x28244, keith.luck@Durhamnc.gov





Attachments

Attachment 1, Parcels Proposed for Inclusion in the UGA

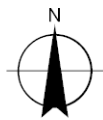
Attachment 2, City Council Resolution, Southwest Durham Urban Growth Area
Boundary Amendment

Map 1, Parcels Proposed for Inclusion in UGA



-  Proposed UGA
-  Present UGA
-  2006 Interpretation Parcels
-  City of Durham

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Feet



Durham City-County Planning, December 2010